In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1515

HAROLD S. RODOVICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial with three co-defendants in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of having conspired to violate the counterfeiting laws, and on two substantive counts of having possessed and delivered $2,660 in counterfeit money on October 1, 1970, in violation of 18 U.S.C. 371, 472 and 473. He was sentenced to concurrent prison terms of five years for the conspiracy and ten years for the sub-

stantive offenses. The court of appeals affirmed (Pet. App. 1a-4a). Petitioner's primary defense was entrapment.

The evidence showed that in September 1970 petitioner and Michael Calarusse passed approximately $2,000 in counterfeit United States currency during a trip from Miami to Connecticut. They were arrested for this when they reached Connecticut, but were permitted to return to Miami. After Calarusse arrived in Miami on September 22, 1970, Secret Service agents asked him to cooperate with them and to determine whether petitioner had any more counterfeit money to sell (J.A.[1] 391-394, 536-537, 541-542). Calarusse agreed; according to the agents who supervised his activities, he was given no promises but was motivated by a hope of reward for his cooperation (J.A. 393, 463-464).[2]

On September 28, 1970, Calarusse reported that petitioner did have some counterfeit money to sell at fifty percent of the face value. He was instructed to tell petitioner that he had found a buyer (J.A. 400-401). On October 1, 1970, Calarusse telephoned petitioner and arranged a meeting for that afternoon. At the meeting, Calarusse introduced petitioner to the buyer who was in fact a federal agent, Ward. Following some bargaining, petitioner agreed to sell Ward $2,660 in

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[1] "J.A." refers to the Joint Appendix filed in the court of appeals and lodged with the Clerk of this Court, which contains the transcript of the trial.

[2] There was conflicting testimony by federal agents as to whether Calarusse was paid for his information (J.A. 412-413, 462).

counterfeit money for $950. The two men then went to petitioner's car where petitioner gave the agent $2,660 in counterfeit twenty-dollar bills. The agent gave petitioner $950. (J.A. 116-117, 125-126, 402, 461-462). The two men returned to the bar and conversed about future purchases of counterfeit notes. Petitioner indicated that if the agent ordered a large enough quantity, such as $100,000, the price would come down to twenty percent. In response to questions, petitioner stated that it would take some time to get the money since it was coming from out of town. Ward gave petitioner a telephone number at which he could be reached when the money was available (J.A. 126, 131-132).

Between October 1 and November 8, Ward and another undercover agent, D'Amelio, maintained contact with petitioner (J.A. 132, 175-176). On November 8, petitioner telephoned D'Amelio saying that he was getting $250,000 in counterfeit money. He asked D'Amelio whether he could "use" any more than the $100,000 previously ordered. D'Amelio agreed to buy another $25,000 at twenty percent. On the next day, petitioner called D'Amelio and told him to come to Miami immediately since he had the counterfeit money and indicated that the transfer could take place on November 10. D'Amelio and Ward went to Miami and arranged surveillance with other agents. (J.A. 211-215).

After meeting the undercover agents as arranged, petitioner made a telephone call. About forty-five minutes later two men arrived carrying a suitcase.

Petitioner took Agent Ward to inspect the suitcase which was later found to contain $250,000 in counterfeit bills. Shortly thereafter petitioner and the two men who had delivered the suitcase were arrested (J.A. 136-141, 312-320).

At the trial petitioner asserted the defense of entrapment. He testified that in late September 1970 Calarusse came to his home and told him that he desperately needed money to keep his family from being evicted and to pay back a loan shark from whom he had borrowed; that Calarusse entreated him over a period of several days to engage in a sale of counterfeit bills and that as a direct result of these importunings, petitioner agreed to do so (J.A. 520-521, 526-527). Calarusse was present at the trial in response to a defense subpoena (J.A. 523) but was not called to testify.

On cross-examination petitioner was asked whether he had ever been convicted of a felony. He said no, whereupon his attorney came to the bench and explained that the answer was at his direction, that petitioner had been convicted but had been granted a full pardon. The judge ruled that the fact of the conviction could be used for impeachment both because the denial of the felony was a misstatement and because a pardoned conviction can still be used for impeachment. (Pet. 8-9). The prosecutor then repeated his question before the jury, and petitioner replied that he had been convicted of a felony but had received a full pardon (J.A. 538-541).

1. Petitioner contends that the evidence established entrapment as a matter of law. As the court of ap-

peals held, however, there was sufficient evidence of petitioner's predisposition to warrant submission of the issue to the jury. See *Masciale* v. *United States*, 356 U.S. 386. Petitioner had passed counterfeit money in Connecticut shortly prior to being approached by Calarusse. Moreover, petitioner's negotiations with the undercover agents and the obtaining of a large quantity of counterfeit money from an outside source all indicated that petitioner was no amateur in these matters. Although petitioner testified that he had been beseeched by Calarusse to engage in the initial transaction involving $2,660, the jury need not have believed that testimony and at any rate did not have to credit the assertion that petitioner had been unwilling to engage in the illegal activity and had been persuaded to do so by Calarusse.

Petitioner's reliance on cases such as *Greene* v. *United States*, 454 F.2d 783 (C.A. 9); *United States* v. *Bueno*, 447 F.2d 903 (C.A. 5); and *United States* v. *Chisum*, 312 F. Supp. 1307 (C.D. Calif.), is misplaced. The *Bueno-Chisum* line of cases deals with the different situation where government agents furnish all or part of the means to commit the offense.[3] Here, by contrast, it was petitioner who supplied the counterfeit money. In *Greene*, *supra*, the court found that, on the unique facts of that case, the govern-

[3] *United States* v. *Russell*, No. 26,485, C.A. 9, decided April 6, 1972, pending on petition for a writ of certiorari, No. 71-1585, relied on by petitioner (Pet. 14-15), is similar to *Bueno* and *Chisum* in that there the undercover agent supplied one of the chemicals needed by the defendant to manufacture an illicit drug.

ment had indulged in too great a degree of participation in the crime irrespective of the absence of traditional entrapment since the defendant was predisposed to commit the offense.[4] No such factual situation is presented by this case. The attempt to arrange additional purchases bears no resemblence to *Greene* and was, in any event, a reasonable way to attempt to ascertain the identity of others involved in the counterfeiting.

2. Relying on *Loper* v. *Beto*, No. 70-5388, decided March 22, 1972, which held it reversible error to use a prior conviction for impeachment where the conviction was void because the defendant had been denied the right to counsel, petitioner contends that it was error to permit his impeachment by reference to a felony conviction for which he had received a full pardon. It is settled, however, that a pardon (unless granted, as not shown here, on the ground of innocence) does not have the effect of erasing a conviction *ab initio*, and thus does not prevent the use of that conviction for impeachment in the federal courts. *E.g.*, *Gurleski* v. *United States*, 405 F.2d 253, 266 (C.A. 5), certiorari denied, *sub nom. Smith* v. *United States*, 395 U.S. 977; *United States* v. *Denton*, 307 F.2d 336, 339 (C.A. 6), certiorari denied, 371 U.S. 923; *Richards* v. *United States*, 192 F.2d 602 (C.A.D.C.), certiorari denied, 342 U.S. 946.

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[4] *Williamson* v. *United States*, 311 F. 2d 441 (C.A. 5), also involved a special factual situation—a contingent fee arrangement with an informer to produce evidence against a certain named defendant for crimes not yet committed—not posed by the facts of this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1972.

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